IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 202.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Petitioner,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF WRIT OF CERTIORARI.

This brief is submitted in opposition to the petition for certiorari served on respondents on June 29, 1955. The opinions of the Court of Appeals are printed in Petitioner's brief. The opinion of the United States District Court for the Southern District of New York (not officially reported) is printed herewith.

Statement.

This is a stockholder's action brought by one of the stockholders of Kaiser-Frazer Corporation on behalf of said corporation.

The claim involved in this action has been settled and all of the defendants herein have been expressly released.

Both the settlement and the release were expressly approved in a 23(c) proceeding by the United States District Court for the Eastern District of Michigan in a stockholder's action, entitled *Pergament* v. *Frazer*, 93 F. Supp. 13 (E. D. Mich. 1950), *aff'd sub-nom Masterson* v. *Pergament*, 203 F. 2d 315 (6th Cir. 1953), *cert. denied* 346 U. S. 832 (1953).

This petitioner stockholder, among others, vigorously opposed this settlement on the same grounds he now urges, *i. e.*, that the settlement was procured by fraud. This claim of fraud was expressly rejected by both the District Court for the Eastern District of Michigan and the Court of Appeals for the Sixth Circuit.

Despite this, petitioner stockholder seeks to relitigate the entire issue of fraud in violation of an order of the approving court which declared the settlement to be binding upon each and all of Kaiser-Frazer's stockholders. The sole ground relied upon by petitioner for continuing this settled action is that one of the directors, Brown,* was not a party to the 23(c) proceeding, having been dropped

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* Petitioner, while conceding, for the purpose of the petition, that the settlement and release is effective against everyone except Brown, contends in an elaborate footnote that the court below was wrong in this determination. To straighten out the record, the release in this action released not only the party defendants in the action, but also eight other individuals and three corporations. Of the ten individual defendants, petitioner claims only three were in court in Michigan and parties to the Michigan decree (Pet. P. R. p. 7). Actually Messrs. Henry J. Kaiser, Edgar F. Kaiser, Frazer, Bedford, MacDonald and Price formally appeared in the *Pergament* action (*Pergament* Rec. Vol. I, pp. 2, 4, 7). Of these, the two Messrs. Kaiser, Frazer and Price testified in person at the hearings. (*Pergament* Rec. Index, pp. 7, 8). In addition Messrs. Brown and Trefethen were also witnesses and testified extensively (*Pergament* Rec. Index, pp. 5, 6, 7, 9.) Thus, only Sherwood and Motter (both deceased) did not appear or participate in the *Pergament* proceedings.

therefrom because his presence would defeat the jurisdiction of the approving court. It is, therefore, claimed by petitioner that Brown at least cannot set up the release as a bar to the continuance of this action unless and until the absence of fraud in respect of the settlement agreement is re-established by another court in an action apparently to be continued against Brown alone.

It is conceded by petitioner that the claim involved herein has been released and that this release has been judicially approved and that this approval has been affirmed with certiorari denied. But Petitioner claims the right to relitigate the validity of the release against Brown alone.

The Petition.

First Reason for Review.

The first reason upon which petitioner relies in asking that this court grant the writ of certiorari is that the question decided by the court below is an important question of federal law which has not been but should be decided by this court.

This so-called important question is also classified as one of first impression and apparently derives its importance primarily because the Court of Appeals for the Second Circuit disagreed on the basis of the decision. This is no basis for the granting of a writ of certiorari (Rule 19 of the Rules of the Supreme Court of the United States).

A brief look at the question involved robs it of distinction. The settlement agreement, which included the the release to Brown, was expressly made subject to the approval of the United States District Court for the Eastern District of Michigan. Without this approval, the

agreement and the release were to be null and void (P. R. 161)*. The agreement and release were approved, the approval was affirmed and certiorari was denied.

In the instant litigation the United States District Court for the Southern District of New York on the basis of this judicially approved release granted to the respondents summary judgment in an opinion printed herewith (pp. 8-9).

The Court of Appeals affirmed upholding the validity of the release and refusing to permit the relitigation of the issue of fraud merely because Brown had been dropped as a party to the Michigan action in order to preserve diversity jurisdiction.

To claim as petitioner does that this represents an extention of diversity jurisdiction is palpably absurd. All the decision stands for is that a release approved in proceedings pursuant to Rule 23(c) is valid and effective according to its terms.

The Second Reason.

The second reason upon which petitioner relies for the granting of a writ of certiorari is that the decision of the court below p . bably conflicts with decisions of this court and with decisions in other circuits.

For this argument petitioner claims a conflict with the cases of *Bigelow* v. *The Old Dominion Copper & Smelting Co.*, 225 U. S. 111 (1912) and *Lawlor* v. *The National Screen Service Corp.*, 75 Sup. Ct. 865 (1955).

The decision in neither of these cases would appear to be relevant to the position taken by the petitioner. Neither case involved the validity of a release that had judicial approval under Rule 23(c) nor parties who were in privity with each other.

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* P. R. refers to the record in the 23(c) proceeding.

The Lawlor case is also distinguishable on a number of other grounds, including the fact that the new defendants named therein were not parties to the conspiracy alleged in the earlier action, the difference between the causes of action involved in the first and second lawsuit, and the fact that the liability of defendants in the later action was not altogether dependent on the culpability of the defendants in the earlier action.

In the instant case it is clear that Brown must be regarded as in privity with the defendants in the Michigan action and entitled to plead the judicially approved settlement in that action as a bar to the present action to the same extent as if he were a formal party to that action. This conclusion of privity is compelled in view of Brown's position as a director of defendant corporation, *Straus* v. *American Publishers Assn.*, 201 Fed. 306 (2d Cir., 1912), *app. dis.*, 235 U. S. 716 (1914), *Ganca Importing Co.* v. *American Importing & Transportation Co.*, 247 Fed. 413 (2d Cir., 1917), because of his close association with the parties to the prior action and his personal and financial interest in the result by reason of the statutory obligation of contribution, cf. *Columbia Ins. Co. of New Jersey* v. *Mart-Waterman Co.*, 11 F. 2d 216 (2d Cir.), *cert. denied* 271 U. S. 672 (1926), and because of his participation in, and control of, the prior litigation to the same or to a greater extent than that of the formal party defendants. *U. S. Envelope Co.* v. *Transo Paper Co.*, 221 Fed. 79 (D. Conn., 1915); *E. I. du Pont de Nemours Co.* v. *Sylvania Industrial Corp.*, 122 F. 2d 400 (4th Cir., 1941); *Universal Oil Products Co.* v. *Winkler-Koch Engineering Co.*, 27 F. Supp. 161 (N. D. Ill., 1939).

Nothing in Judge Clark's opinion is in conflict with the Bigelow or the Lawlor decisions. He pointed out that the

policy of the Bigelow case had "little relevance". He did not rely on the decision of the Third Circuit in the Lawlor case as claimed by Petitioner (Pet. p. 10), saying in regard to this decision "here we need not go so far".

The Third Reason.

The third reason upon which petitioner relies is that the decision below conflicts with the important federal policy of preventing questionable settlements by corporate fiduciaries. Petitioner argues, in effect, that the courts below decided that any settlement approved under 23(c) exonerates all fiduciaries against whom a claim could be asserted. This is not so. The courts below merely decided that the particular settlement agreement in the case at bar was valid and released all of those persons (including Brown) which it expressly purported to release. This is neither novel nor dangerous doctrine and raises no question of federal policy. The Court was not concerned with and never even mentioned any question of fiduciary accountability, and all of petitioner's discussion of this issue is entirely irrelevant.

Conclusion.

No basis for granting a writ of certiorari exists and the prayer of the petition should be denied.

Respectfully submitted,

LOUIS F. CARROLL,
Counsel for Respondent,
Kaiser-Frazer Corporation.

HAROLD J. CORBIN,
Counsel for Respondents,
Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., and Walston S. Brown.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants.

(*The Original Opinion is Endorsed on the Moving Papers.*)

The identical claims asserted in the instant derivative suit brought on behalf of the Kaiser-Frazer Corporation were alleged in *Pergament* v. *Joseph W. Frazer, et al.*, a derivative suit filed by another stockholder of the same corporation. The Pergament suit was settled after proceedings duly had under Rule 23(c) F. R. P. C. upon due notice. The plaintiff herein appeared in these proceedings and objected to the settlement proposed; his objections after full hearing were overruled (98 F. Supp. 9, aff'd 203 F. 2d, 315 (6th Cir. 1953) cert. den. October 12, 1953, Docket No. 133).

The settlement in the Pergament suit released all the defendants named in the instant suit from any and all claims arising out of the matters alleged herein. It was determined that fraud was not present in the accomplish-

ment of the Pergament action, but, in any event, the settlement may not be here collaterally attacked after judicial approval.

Motion granted; complaint dismissed with prejudice, without costs; the Clerk is directed to enter judgment accordingly.

SYLVESTER J. RYAN,
U. S. D. J.

2/11/54